APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

1927
June, 6.

BALMUKAND AND ANOTHER (PLAINTIFFS) *v.* TULA RAM AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 6—*Offerings at a temple—Right to receive, transferable—"Property"—"Mere possibility"*.

Although the right to receive the emoluments attached to a priestly office is not, in the absence of a custom or usage to the contrary, ordinarily transferable, when the right to receive offerings made at a temple is independent of an obligation to render services involving qualifications of a personal nature, such as officiating at the worship, there is no justification for holding that such a right is not transferable. *Mancharam* v. *Pranshankar* (1), *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* (2), *Durga Bibi* v. *Chanchal Ram* (3) and *Srimati Mallika Dasi* v. *Ratanmani Chakarvarti* (4), referred to. *Paragi* v. *Gauri Shankar* (5), distinguished. *Puncha Thakur* v. *Bindeswari Thakur* (6) and *Sukh Lal* v. *Bishambhar* (7), dissented from. *Ahmad-ud-din* v. *Ilahi Bakhsh* (8), followed.

THIS was a plaintiffs' appeal arising out of a suit brought to recover a sum of money alleged to be due to the plaintiffs on a *theka* given by them to the defendants for the collection of offerings to a certain deity installed in a temple, and for the cancellation of that *theka*, and for a perpetual injunction restraining the defendants from interfering with the plaintiffs' right of making the collections themselves.

The deity in question was installed by one Asa Ram, and Asa Ram and his descendants received the offerings made to the deity by devotees resorting to the

* Second Appeal No. 953 of 1925, from a decree of A. G. P. Pullan, District Judge of Moradabad, dated the 8th of April, 1925, confirming a decree of Ganga Nath, Subordinate Judge of Moradabad, dated the 9th of August, 1923.

(1) (1882) I.L.R., 6 Bom., 298.
(2) (1876) 4 I.A., 76.
(3) (1881) I.L.R., 4 All., 81.
(4) (1897) 1 C.W.N., 493.
(5) (1918) 51 Indian Cases, 86.
(6) (1915) I.L.R., 43 Calc., 28, and (1916) 37 Indian Cases, 960.
(7) (1916) I.L.R., 39 All., 196.
(8) (1912) I.L.R., 34 All., 465.

temple. One of the descendants of Asa Ram mortgaged his right to receive a share of the offerings to Dwarka Das, father of the plaintiffs appellants, prior to the year 1874. Dwarka Das put that mortgage into suit and obtained a decree for sale on the 16th of June, 1874. When Dwarka Das proceeded to execute the decree the judgement-debtor objected to the execution on the ground that the offerings made at the temple were *waqf* and were not saleable in execution of the decree. That objection was disallowed by the court on the 13th of May, 1879, and it was held in that case that the property in question was not *waqf* property and was saleable in execution of the decree. This order of the execution court was upheld on appeal, on the 5th of December, 1879. A similar objection was preferred by some relation of the judgement-debtor to the execution of the decree and that was also disallowed by the court on the 13th of May, 1879. The right to receive a share of the offerings was eventually sold in execution of the decree obtained by Dwarka Das and was purchased by him. The judgement-debtor again objected to the sale on the ground *inter alia* that the offerings made at the temple were not saleable in execution of the decree, but the objection was overruled.

Thereafter in the year 1895 a suit was brought by some of the descendants of Asa Ram for a declaration that Dwarka Das had not acquired any right, by virtue of the auction-purchase made by him, to receive a share of the offerings made to the deity, and for an injunction restraining Dwarka Das from receiving the same. It was alleged in that suit that the male descendants of Asa Ram always served the deity and managed the affairs of the temple; that no one else had a right to worship in that temple or receive the offerings made to the deity, that the right to receive the offerings was not transferable, and that Dwarka Das acquired no right by

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the purchase made by him in execution of the decree of 1874. Dwarka Das contested that suit and one of the issues raised in the case was whether the offerings were dedicated for any charitable purposes and whether they were transferable. The finding of the court on that issue was as follows :—

"There is overwhelming documentary evidence to show that the co-sharers always treated the property as their exclusive property and mortgaged and sold it to the extent of their shares and thereby outsiders were induced to deal with the property."

On this finding the plaintiffs' suit was dismissed. The unsuccessful plaintiffs appealed against the decree of the trial court and their appeal was dismissed on the 6th of December, 1899. The learned Judge of the appellate court made the following observations in the course of his judgement :—

"I agree with the Munsif that the offerings in dispute or the right to receive them cannot be treated as trust property. . . . Moreover it is well proved that the offerings have always been dealt with as absolute property of the members in possession, being transferred from time to time."

It further appeared that a suit had been brought by one of the present plaintiffs, for the recovery of money, on the basis of a *qabuliat* executed prior to the *qabuliat* in dispute in the present litigation, and was decreed *ex parte* against defendants Nos. 1 and 3 on the 19th of January, 1915.

It was also in evidence that the present plaintiffs had brought a suit on the basis of the *qabuliat* and the lease now in dispute for recovery of the *theka* money against defendants Nos. 1 and 3 and that that suit was decreed *ex parte* on the 21st of March, 1921, and the appellants contended that the *ex parte* decree obtained by the plaintiffs barred the defence now raised by the defendants in the suit giving rise to the present appeal.

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On this appeal—

Babu *Piari Lal Banerji* and Munshi *Shabd Saran*, for the appellants.

Munshi *Narain Prasad Ashthana*, for the respondents.

THE judgement of the Court (ASHWORTH and IQBAL AHMAD, JJ.), after setting out the facts as above, thus continued :—

The learned counsel for the respondents argues that the cause of action for the present suit being different from the cause of action on which the former suit was based, section 11 of the Code of Civil Procedure does not apply and, further, that the question whether the right to collect the offering is or is not transferable, being a question of law, the former decision cannot operate as *res judicata* in the present suit. He also points out that only defendants Nos. 1 and 3 of the present suit were defendants in the suit that was decreed *ex parte* in March, 1921, and the remaining two defendants of the present suit not being parties to that litigation are not bound by the decree in that suit.

If the managing member of the joint family consisting of the four defendants was a defendant in the former suit he would be deemed, in the absence of evidence to the contrary, to have been sued in a representative capacity, and the decree obtained against him would be binding on all the members of the family. However, there is nothing in this case to show whether the managing member of the family of the defendants was or was not a defendant in the former suit, and, therefore, it may be that the decree in that suit is not binding on defendants Nos. 2 and 4 of the present suit. But in our judgement defendants Nos. 1 and 3 are now barred from contesting the plaintiffs' suit on the ground that the right to collect the offerings made to the deity are not transferable. It was open to these defendants to

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contest the former suit on the ground that the offerings were not transferable, and they having failed to make this matter a ground of defence in that suit are now barred from raising that plea. As already stated, the former suit was based on the very *qabuliat* and the lease on the basis of which the present suit was brought, and the mere fact that the present suit is for years different from the year for which the former suit was brought, does not entitle defendants Nos. 1 and 3 to contest the present suit on a ground on which they could have contested the former suit but failed to do so. The plaintiffs could only be held entitled to a decree in the former suit if the right to collect the offerings was a transferable right and, therefore, the question of the transferability or otherwise of the right to receive the offerings was a matter directly and substantially in issue in the former suit. It is clear that the plaintiffs and defendants Nos. 1 to 3 were, and are, litigating under the same title in the former and in the present suit, and the court that decided the former suit was competent to try the present suit and, therefore, the case comes within the purview of section 11 of the Code of Civil Procedure. The question whether or not the right to collect the offerings made to the deity installed in the temple in question is transferable is not a pure question of law. In our judgement the answer to the question must in every case depend on a variety of circumstances which can only be proved by evidence. However, we need not pursue this matter further, as in our judgement the plaintiffs are entitled to succeed on the other grounds urged on their behalf.

Before proceeding to deal with the third point argued by the learned counsel for the appellants we may note that the learned counsel for the respondents did not challenge the title of the plaintiffs respondents as auction-purchasers and did not support the decree of the courts

below on the ground that the sale in favour of the plaintiffs was void, and, therefore, we are not called upon to deal with the second point argued on behalf of the appellants.

It now remains to consider whether or not the courts below were right in holding that the right to collect the offerings made at the temple in question was not transferable. We are unable to subscribe to the broad proposition laid down by the courts below that in no case the offerings made to a deity installed in a temple are transferable.

A distinction must be drawn between cases in which emoluments are attached to a priestly office, and the cases in which the offerings are made to a deity and the persons who receive the same have not to render services of a personal nature as a consideration for the receipt of the offerings. The emoluments of the former kind are not, in the absence of a custom or usage to the contrary, ordinarily transferable, for the simple reason that they are inseparably connected with a priestly office and it is contrary to public policy to allow such offices to be transferred to a person not competent to perform the worship, either by private sale or by sale in execution of a decree. As has been pointed out in *Mancharam* v. *Pranshankar* (1) :—

"If such property were subject to attachment and sale, the purchaser might be a Muhammadan or a Christian, who would be both unwilling and incompetent to perform the service of the idol, and in the case of *Dubo Misser* v. *Srinibas Misser* (2), Mr. Justice MITTER further observed that he might be unfit to prepare food for the idol . . . Such an alienation to an improper person would defeat the object of the endowment and in some cases . . . it might be inconsistent with the presumed intention of the founder of the endowment."

As the right to receive the offerings cannot be separated from the duty of officiating at the worship

(1) (1882) I.L.R,. 6 Bom., 298. (2) 15 W.R., C.R., 409.

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the law disfavours the transfer of such emoluments, *vide* the cases of *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* (1), *Durga Bibi* v. *Chanchal Ram* (2) and *Srimati Mallika Dasi* v. *Ratanmani Chakarvarti* (3).

But when the right to receive the offerings made at a temple is independent of an obligation to render services involving qualifications of a personal nature, such as officiating at the worship, we are unable to discover any justification for holding that such a right is not transferable. That the right to receive the offerings, when made, is a valuable right and is property, admits of no doubt and, therefore, that right must, in view of the provisions of section 6 of the Transfer of Property Act, be held to be transferable, unless its transfer is prohibited by the Transfer of Property Act or any other law for the time being in force. It is maintained by the learned counsel for the respondents that the right to receive the offerings is a "mere possibility" of the nature contemplated by clause (*a*) of section 6 of the Transfer of Property Act and, therefore, is not transferable, and, further, that a transfer of the right to receive offerings made at a temple is void as being against public policy. The learned counsel has relied on the cases of *Puncha Thakur* v. *Bindeswari Thakur* (4) and *Puncha Thakur* v. *Bindeswari Thakur* (5) and *Paragi* v. *Gauri Shanker* (6). The last-mentioned case is distinguishable. In that case the subject of the transfer was the right to receive gifts made by the worshippers at the temple to the officiating priest. In short, the right to receive the gift in that case was a right annexed to the office of the officiating priest and, therefore, the case came within the purview of the principle laid down in the cases noted above in which it was held that when

(1) (1876) 4 I.A., 76.
(2) (1881) I.L.R., 4 All., 81.
(3) (1897) 1 C.W.N., 493.
(4) (1915) I.L.R., 43 Calc., 28.
(5) (1916) 37 Indian Cases, 960.
(6) (1918) 51 Indian Cases, 86.

the emolument is attached to a priestly office it is not transferable.

The case of *Puncha Thakur* v. *Bindeswari Thakur* (1) undoubtedly supports the contention of the learned counsel for the respondents. In that case it was held that a right to receive offerings from pilgrims resorting to a temple or shrine is inalienable because "the chance that future worshippers will give offerings is a mere possibility and as such it cannot be transferred." If the learned Judges intended to hold that even if the right to receive the offerings is dissociated from a priestly office or from an obligation to render services involving qualifications of a personal nature, it is not transferable, we, with all respect, are unable to agree with their decision. The right to receive the offerings when made is a definite and fixed right and does not depend on any possibility of the nature referred to in section 6 (*a*) of the Transfer of Property Act. The moment the offerings are made the persons clothed with the right are entitled to appropriate the same. In short, the right to receive the offerings "is not so uncertain, variable and limited as to pass out of the conception of law." It is true that the *amount* of the offerings largely depends upon the surrounding circumstances, viz., the number of votaries, their generosity and their charitable disposition, but the fact that offerings large or small are bound to be made is a certainty and not a mere possibility of the nature referred to in section 6 (*a*) of the Transfer of Property Act and, therefore, we are unable to hold that the transfer of a right to receive the offerings is prohibited by section 6 (*a*) of the Transfer of Property Act. The view that we take is in consonance with the view taken in the case of *Ahmad-ud-din* v. *Ilahi Bakhsh* (2). In that case the validity of a gift to receive a fixed share

(1) (1915) I.L.R., 43 Calc., 28. (2) (1912) I.L.R., 34 All., 465.

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of the offerings made at a Muhammadan shrine was upheld by this Court and it was observed that—

"the thing gifted in this case must be regarded as being the right of the donor to receive a fixed share in the offerings after they have been made and this is an enforceable right in the sense that it is enforceable in law as against other co-sharers in the same."

There is no distinction between the right to collect the offerings made in a Muhammadan shrine and in a Hindu temple and if in one case it is not a mere "possibility" and the right is transferable there is no reason to hold that the right should not be transferable in the other. In the case of *Sukh Lal* v. *Bishambhar* (1) a mortgage by a Maha Brahman of his share in the *brit jajmani* (that is pecuniary interest receivable by way of voluntary donation by virtue of his right to officiate at funeral ceremonies) was upheld. Though the learned Judges in that case observed that "the offerings at a temple do not stand on the same basis as remuneration which Maha Brahmans receive for the services they perform at Hindu funerals", they did not point out the distinguishing features between the two, and we are unable to discover any. No doubt in one case as in the other, the *amount* of the remuneration or of the offerings depends on future events which may be more or less uncertain, but the right to receive the same when those events happen is a definite right. There is no uncertainty about that right. The right is exercised, in the case of a Maha Brahman, when he performs the funeral ceremonies, and in the case of a right to receive the offerings made at a temple when those offerings are made. In the last-mentioned case the contention that the right of a Maha Brahman was a mere possibility within the meaning of section 6 (*a*) of the Transfer of Property Act was repelled by the learned Judges who decided the case.

(1) (1916) I.L.R., 39 All., 196.

The case of *Puncha Thakur* v. *Bindeswari Thakur* (1) was, on an application for review, re-opened and decided by the Patna High Court, *vide Puncha Thakur* v. *Bindeswari Thakur* (2). One of the learned Judges was a party to both the decisions. It was held in that case that a transfer of the right to receive offerings made at a temple is void as against public policy. When the right to receive the offerings is unconnected with any office, it is difficult to appreciate how a transfer of such a right offends against public policy. The right is a right to receive some property that has a marketable value and, in the absence of cogent reasons, one would suppose that the person getting such property has a right to transfer the same. If after the receipt of the property he can, without in any way violating public policy, transfer the same, what difference does it make if he transfers the right to receive the same? It is immaterial to the public at large whether the heirs of the persons who installed the deity or transferees from them take the offerings, for the obvious reason that neither from the one nor from the other they expect services in connection with the temple.

For the reasons given above we hold that the rights to receive offerings made at a temple when dissociated from priestly office are transferable. In the present case it was stated at the Bar that the descendants of Asa Ram received the offerings though they did not perform the worship of the idol nor did any other necessary functions connected with it. That being so, the contention of the defendants that the right was not transferable ought to have been overruled by the courts below.

We may further point out that in the present case the lease was in favour of the persons who themselves had the right to collect the offerings and, therefore, there was nothing against public policy in empowering

(1) (1915) I.L.R., 43 Calc., 28. (2) (1916) 37 Indian Cases, 560.

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them by the lease to collect offerings not only of their share but of the plaintiffs' share as well.

As observed above, the lower appellate court has not decided the other issues framed in the case and as the decision of the lower appellate court was on a preliminary point and we disagree with that court, the only alternative open to us is to set aside the decree of the lower appellate court and remand the case to that court with directions to re-admit the appeal to its original number and to dispose of the same after deciding the other points that call for determination in the case, and we order accordingly. We leave it open to the lower appellate court to allow or not to allow the parties to adduce additional evidence on the remaining issues. The plaintiffs are entitled to the costs of this appeal. Costs of the courts below will abide the result.

Case remanded.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

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July, 14.

ASHRAF BIBI (PLAINTIFF) *v.* MUHAMMAD ABDUL RAOOF AND OTHERS (DEFENDANTS).*

Act (Local) No. XI of 1922 *(Agra Pre-emption Act), section* 12, *sub-clause* (3)*—Pre-emption—Competition between sister and uncle—"The common ancestor."*

In respect of a suit for pre-emption under the Agra Pre-emption Act, 1922, and considered as heirs according to the Muhammadan law, there is no difference in degree between a sister and an uncle of the vendor; but as regards descent from the common ancestor the sister is the nearer, for "the common ancestor" must be construed as "the nearest common ancestor."

Held also, that a pre-emptor who is only of equal degree with the vendee cannot claim to have the property sold

*Second Appeal No. 1030 of 1926, from a decree of Ali Ausat, District Judge of Ghazipur, dated the 10th of March, 1926, confirming a decree of Raj Behari Lal, Subordinate Judge of Ghazipur, dated the 28th of November, 1925.